

BEFORE THE  
DEPARTMENT OF CORPORATIONS  
STATE OF CALIFORNIA

In the Matter of

THE CALIFORNIA CORPORATIONS  
COMMISSIONER,

Complainant,

MELVIN DE LA MOTTE, JR., DBA DE LA  
MOTTE INVESTMENT SERVICES

Respondent.

File No.: 923-3308

OAH No. L2005030748

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated January 9, 2006, is hereby adopted by the Commissioner of Corporations as his Decision in the above-entitled matter with the following technical change pursuant to Government Code Section 11517(c)(2)(C).

The following technical change is made as follows:

ORDER, page 7, Paragraph 1: The term "civil" is replaced with "administrative."

This Decision shall become effective on FEBRUARY 10, 2006.

IT IS SO ORDERED this 9<sup>th</sup> day of FEBRUARY 2006.

CALIFORNIA CORPORATIONS COMMISSIONER

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WAYNE STRUMPFER  
Acting California Corporations Commissioner

BEFORE THE  
DEPARTMENT OF CORPORATIONS  
STATE OF CALIFORNIA

In the Matter of

THE CALIFORNIA CORPORATIONS  
COMMISSIONER,

Complainant,

v.

MELVKN A. DE LA MOTTE, JR., dba DE  
LA MOTTE INVESTMENT SERVICES,

Respondent.

File No. 923-3308

OAH No. L2005030748

**PROPOSED DECISION AFTER REMAND**

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 10, 2005, at Van Nuys, California.

Michelle Lipton, Corporations Counsel, represented Complainant.

Melvin A. De La Motte, Jr. (Respondent) represented himself.

Oral and documentary evidence was received and the matter submitted. The Administrative Law Judge issued a Proposed Decision on July 1, 2005. On October 21, 2005, the Acting California Corporations Commissioner, by and through his Deputy Commissioner and General Counsel, issued an Order rejecting the Proposed Decision. Pursuant to Government Code section 11517, subdivision (c)(2)(D), the matter was remanded to the Administrative Law Judge to take further evidence, and to make a determination on whether to uphold the Order to Discontinue Violations dated February 14, 2005.

On November 18, 2005, the parties stipulated that, rather than taking additional evidence, the Administrative Law Judge could issue his Proposed Decision After Remand based on the transcript of the May 10, 2005 hearing and all exhibits submitted thereat. The Administrative Law Judge completed his review of the transcript and exhibits on December 27, 2005 and the matter was deemed submitted on that date.

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## COMBINED FINDINGS OF FACT AND LEGAL CONCLUSIONS

1. William P. Wood, through his counsel, made the Statement in Support of Order Levying Administrative Penalties (Penalties) and the Statement in Support of Order to Discontinue Violations (Order) in his official capacity as the California Corporations Commissioner (Commissioner) of the Department of Corporations (Department).

2. On February 14, 2005, pursuant to Corporations Code section 25252, the Commissioner issued his Notice of Intention to Issue Order Levying Administrative Penalties against Respondent in the total amount of \$1,500. On the same date, the Commissioner issued his Order to Discontinue Violations, pursuant to Corporations Code section 25249 and his Notice of Intention to make the Order final, pursuant to Corporations Code section 25251. The basis for each of the orders arise from the same set of facts. The Penalties and Order were based on Respondent's failure to: 1) maintain a general ledger in willful violation of California Code of Regulations, title 10, section 260.241.3, subdivision (a)(2) (penalty of \$750); and 2) file the required annual financial reports in willful violation of California Code of Regulations, title 10, section 260.241.2, subdivision (a) (penalty of \$750).

3. Respondent holds a valid and unrevoked investment adviser certificate issued by the Commissioner pursuant to Corporations Code section 25230 on June 19, 1996. Respondent's investment adviser business is located at 1239 Higuera Street, San Luis Obispo, California 93401.

4. On or about June 9, 2003, the Department commenced a regulatory examination of Respondent's investment adviser business. The examination revealed violations of the books and records provisions of the Corporate Securities Law of 1968, Corporations Code section 2500 et seq., and the regulations thereunder found at California Code of Regulations, title 10, section 260.000 et seq.

5. These violations consisted of Respondent's failure to keep true, accurate, and current books and records, including: 1) failing to maintain a general ledger accounting system; and 2) failing to file its annual financial reports. The books and records requirements provide the Department with a regulatory mechanism to validate a firm's liquidity and financial integrity on a monthly basis to ensure that licensees maintain the necessary net capital for the protection of the public. Respondent's failure to keep true, accurate, and current books and records prevents the Department from determining, as part of its regulatory examination, if Respondent met the capital requirements imposed by the Corporations Code and the regulations enacted thereunder.

6. Corporations Code section 25241 provides that investment advisers are required to maintain books and records which are subject to examination by the Commissioner. Section 25241 provides, in relevant part, as follows:

[E]very investment adviser licensed under Section 25230 shall make and keep such accounts, correspondence, memoranda, papers, books, and other records and shall file such financial and other reports as the commissioner by rule requires, subject to the limitations of . . . section 222 of the Investment Advisers Act of 1940 with respect to investment advisers. All records so required shall be preserved for the time specified in the rule. All records referred to in this section are subject at any time and from time to time to such reasonable periodic, special, or other examinations by the commissioner, within or without this state, as the commissioner deems necessary or appropriate in the public interest for the protection of investors.

7. California Code of Regulations, title 10, section 260.241.3 sets forth the specific books and records, which are required to be maintained by investment advisers. Specifically, subdivision (a)(2) of section 260.241.3 provides as follows:

- (a) Every licensed investment adviser shall make and keep true, accurate and current the following books and records relating to such person's investment advisory business:
- (b) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

8. The Department's examiner found, during a regulatory examination on June 9, 2003, that Respondent did not maintain a general ledger accounting system, or "other comparable records," in violation of California Code of Regulations, title 10, section 260.241.3, subdivision (a)(2).

9. California Code of Regulations, title 10, section 260.241.2, subdivision (a) requires the filing of an annual report by certain investment advisers. Prior to April 3, 2003, California Code of Regulations, section 260.241.2, subdivision (a)(2), provided as follows:

(a) General Rule. Subject to the provisions of Subsection (c) of this section, ... every licensed investment adviser subject to the provisions of section 260.237.1 of these rules, shall file an annual financial report containing the information required by a form or forms to be supplied or approved by the Commissioner, as follows:

(2) The annual report of investment advisers shall contain a Statement of Financial Condition. Supporting schedules shall contain

computations of net capitals, aggregate indebtedness and ratios required under section 260.237.1 and the certificate of the accountant required under subsection (e) of section 260.237 of these rules.

10. California Code of Regulations, title 10, section 260.237.1 contains the alternative minimum capital requirements for investment advisers. California Code of Regulations, title 10, section 260.237.1, subdivision (a)(2) provided, and presently provides, in relevant part, as follows:

(a) No investment adviser who has any power of attorney from any investment advisory client to execute transactions . . . shall permit its total aggregate indebtedness to exceed 500% of its tangible net capital or permit its current aggregate indebtedness to exceed its current net capital; and,

(2) If the investment adviser has any power of attorney from any investment advisory client to execute transactions and does not have regular or periodic custody or possession of any of its investment advisory clients' securities or funds, except the receipt of prepaid subscriptions for periodic publications, or other investment advisory services, it shall at all times have and maintain tangible net capital of not less than \$5,000. . .

11. Subdivision (c) of California Code of Regulations, title 10, section 260.237.1 provided, and currently provides, that for purposes of California Code of Regulations, title 10, section 260.237.1, subdivision (a), all financial information shall be determined in accordance with generally accepted accounting principles. Likewise, California Code of Regulations, title 10, section 260.237.2, subdivision (d) provides that a licensee's net worth shall be determined by generally accepted accounting principles.

12. Respondent has power of attorney or discretionary power to execute transactions in the brokerage accounts of its investment adviser clients. Therefore, prior to April 3, 2003, Respondent was required to meet the capital requirements under California Code of Regulations, title 10, section 260.237.1, subdivision (a)(2) and to show proof of compliance with this regulation by filing annual financial reports required by section 260.241.2, subdivision (a).

13. As of June 9, 2003, Respondent failed to submit annual financial reports for the years of 1999 through 2002, in violation California Code of Regulations, title 10, section 260.241.2, subdivision (a).

14. On July 9, 2003, the Department sent Respondent a regulatory letter notifying him of the various violations discovered during the June 2003 examination conducted pursuant to Corporations Code section 25241, including violations of California Code of Regulations, title 10, sections 260.241.3, subdivision (a)(2) and 260.241.2, subdivision (a).

The Department's letter also requested that Respondent confirm that proper books, records and reports would be maintained in the future and requested that Respondent submit specific records.

15. The Department requested that Respondent provide the following: 1) a description of the accounting system established to comply with the law, an affirmation that the system will be posted on at least a monthly basis and that a written record of net capital will be prepared each month and maintained as a business record; and 2) confirmation that Respondent would timely file all future annual financial reports and would include the financial reports for the years ending 2001 and 2002, with an explanation of why the reports had not been filed.

16. In a letter dated August 26, 2003, Respondent replied to the Department's letter and confirmed that he had installed Quickbooks on his office computer so that in the future he could comply with California Code of Regulations, title 10, section 260.241.3, subdivision (a)(2). Respondent also confirmed that he would file annual reports as required by law so that it could comply with California Code of Regulations, title 10, section 260.241.2, subdivision (a).

17. At the hearing of this matter, Respondent contended he should not be fined by the Commissioner, at least with respect to his failure to keep a general ledger, because he had maintained a checkbook with running balances that provided the same information as a general ledger would. This assertion is rejected. A common check book showing deposits (income) and checks written (expenses) is by no means a general ledger. A general ledger is the record of all account entries including liabilities, capital reserve and the like. A trial balance, which is obtained from information in the general ledger, could not accurately be generated from the financial records Respondent maintained. A trial balance is a listing of the accounts in the general ledger and their balances as of a specified date. A trial balance is usually prepared at the end of an accounting period and is used to see if additional adjustments are required to any of the balances. Since the basic accounting system relies on double-entry bookkeeping, a trial balance will have the same total debit amount as it has total credit amounts. Respondent had no such records. In fact, at the hearing, Respondent did not even provide his checkbook to back up his assertion that the checkbook was comparable to a general ledger.

18. Respondent had no viable explanation as to why he failed to submit the required annual reports.

19. Respondent failed to demonstrate any financial hardship would occur should he be required to pay the administrative penalties.

20. Corporations Code section 25252 provides:

The commissioner may, after appropriate notice and opportunity for hearing, by orders, levy administrative penalties as follows:



(a) Any person subject to this division, other than a broker-dealer or investment adviser, who willfully violates any provision of this division, or who willfully violates any rule or order adopted or issued pursuant to this division, is liable for administrative penalties of not more than one thousand dollars (\$ 1,000) for the first violation, and not more than two thousand five hundred dollars (\$ 2,500) for each subsequent violation.

(b) Any broker-dealer or investment adviser that willfully violates any provision of this division to which it is subject, or that willfully violates any rule or order adopted or issued pursuant to this division and to which it is subject, is liable for administrative penalties of not more than five thousand dollars (\$ 5,000) for the first violation, not more than ten thousand dollars (\$ 10,000) for the second violation, and not more than fifteen thousand dollars (\$ 15,000) for each subsequent violation.

(c) The administrative penalties shall be collected by the commissioner and paid into the State Corporations Fund.

(d) The administrative penalties available to the commissioner pursuant to this section are not exclusive, and may be sought and employed in any combination with civil, criminal, and other administrative remedies deemed advisable by the commissioner to enforce the provisions of this division.

Corporations Code section 25249 provides:

If, after examination or investigation, the commissioner has reasonable grounds to believe that any broker-dealer or investment adviser has violated any law or rule binding upon it, the commissioner shall, by written order addressed to the broker-dealer or investment adviser, direct the discontinuance of the violation. The order shall be effective immediately, but shall not become final except in accordance with the provisions of Section 25251.

Finally, Corporations Code section 25251 provides:

(a) No order issued pursuant to Section 25249 or 25250 may become final except after notice to the affected broker-dealer or investment adviser of the commissioner's intention to make the order final and of the reasons for the finding. The commissioner shall also notify the broker-dealer or investment adviser that upon receiving a request the matter shall be set for hearing to commence within 15 business days

after receipt of the request. The broker-dealer or investment adviser may consent to have the hearing commence at a later date. If no hearing is requested within 30 days after the mailing or service of the required notice, and none is ordered by the commissioner, the order may become final without a hearing and the broker-dealer or investment adviser shall immediately discontinue the practices named in the order. If a hearing is requested or ordered, it shall be held in accordance with the provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and the commissioner shall have all of the powers granted under that act. If, upon the conclusion of the hearing, it appears to the commissioner that the broker-dealer or investment adviser is conducting business in an unsafe and injurious manner or is violating any law of this state, or any rule binding upon it, the commissioner shall make the order of discontinuance final and the broker-dealer or investment adviser shall immediately discontinue the practices named in the order.

(b) The broker-dealer or investment adviser may within 10 days after an order is made final commence an action to restrain enforcement of the order. If the enforcement of the order is not enjoined within 10 days by the court in which the action is brought, the broker-dealer or investment adviser shall comply with the order.

21. The Commissioner has established that Respondent willfully violated California Code of Regulations, title 10, sections 260.241.3, subdivision (a)(2), by failing to properly maintain a general ledger, and 260.241.2, subdivision (a), by failing to file annual financial reports for the years 1999 through 2002, as set forth in paragraphs 2 through 17. Accordingly his Order Levying Administrative Penalties, in the total amount of \$1,500, should be affirmed, and his Order to Discontinue Violations and his Notice of Intention to Make Final the Order to Discontinue Violations should be sustained.

\* \* \* \* \*

## ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The Commissioner's Order Levying Administrative Penalties is affirmed. Respondent shall pay to the Department civil penalties totaling \$1500 at such time and in such manner as the Department, in its discretion, may direct.



2. Respondent is hereby ordered to immediately discontinue those acts that were in violation of California Code of Regulations, title 10, sections 260.241, subdivision (a) and 260.241.3, subdivision (a)(2).

Date: 1-9-06

RALPH B. DASH  
Administrative Law Judge  
Office of Administrative Hearings